No. 98-____ (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RACHEL HICKERSON, DEREK JONES,
TY MCCONNELL and ELLIOT STAMLER,

Petitioners,

—v.—

THE CITY OF NEW YORK, RUDOLPH W. GIULIANI, as Mayor of the City of New York, GASTON SILVA, as Commissioner of the Department of Buildings of the City of New York, and JOSEPH B. ROSE, as Director of the Department of City Planning of the City of New York,

Respondents,

TIMES SQUARE BUSINESS IMPROVEMENT DISTRICT and CENTER FOR THE COMMUNITY INTEREST, *et al.*,

Respondents-Intervenors.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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78 pp

QUESTIONS PRESENTED

1. Whether the Second Circuit fundamentally misconstrued this Court's decisions in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), and Young v. American Mini Theatres, 427 U.S. 50 (1976), when it upheld New York City's adult zoning ordinance without requiring the City to demonstrate the actual existence of reasonable alternative locations for the numerous First Amendment enterprises forced to relocate or close in direct conflict with the approach taken by the Ninth and Fifth Circuits in similar cases?

2. Whether the courts below erroneously denied petitioners' request for injunctive relief upon the ground that petitioners' First Amendment claims would be barred by principles of collateral estoppel in disregard of the standard identified by this Court in Montana v. United States, 440 U.S. 147 (1979)?

PARTIES TO THE PROCEEDING

With the exception of the intervenors, the caption of the case contains the names of all the parties to the proceeding. In addition to Times Square Business Improvement District and Center for the Community Interest, the other Intervenors are:

Bellaire/Bell-Ville Civic Association, Bnos Israel Girls' School, Bowne Park Civic Association, Briarwood Community Association, Bronx Community Board # 12, Brooklyn Civic Council, Brooklyn Tenants Council, Cardinal Spellman High School, Coalition of United Residents for a Safer Environment, College Point Board of Trade, Committee for a Better and Safer Nostrand Avenue, Communities of Maspeth and Elmhurst Together, Community School District 21 Presidents' Council, Congregation Bnai Shloima Zalman, Crown Heights Taxpayers and Civic Association, Douglaston Civic Association, East Midwood Neighborhood Association, Councilmember Andrew Eristoff, Grand Central Partnership, Holliswood Civic Association, Hudde Junior High School Parents Association, Jackson Heights Community Development Corporation, Kings Highway District Management Association, Kingsway Jewish Center; Lawyers' Committee on Violence, Manhattan Terrace Civic Association, Councilmember Helen Marshall, Midwood Civic Action Council Inc., Northern Boulevard Business Association, Northern Boulevard Merchants' Association, 100-299 East 77th Street Block Association, Prospect Park Yeshiva, Queens Braddock Civic Association, Queens Village Civic Association, Real Estate Board of New York, Residents Against Street Prostitution, Rosedale Block Association, Rosedale Civic Association, Councilmember John Sabini, 34th Street Partnership, United Civic Council of Queens, United Community

Civic Association, Councilmember Anthony Weiner, West 45th Street Block Association, West 47th/West 48th Street Block Association and West 90's/West 100's Neighborhood Coalition.

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Rachel Hickerson, Derek Jones, Ty McConnell and Elliot Stamler respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS ENTERED IN CASE

The order of the Second Circuit denying rehearing is unreported. App. 1a. The opinion of the Second Circuit is reported at 146 F.3d 99. App. 4a. The opinions of the U.S. District Court for the Southern District of New York are reported at 997 F. Supp. 418 and 932 F. Supp. 550. App. 32a and 45a. The opinion of the New York Court of Appeals is reported at 91 N.Y.2d 382. App. 65a. The opinion of the New York Appellate Division, First Department is reported at 241 A.D.2d 360. App. 92a. The opinion of the New York Supreme Court is reported at 171 Misc.2d 376. App. 95a.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution appears in the App. at 123a. Article I, § 8 to the New York State Constitution appears in the App. at 123a. Amendment N 950384 ZRY to the Zoning Resolution of the City of New York appears in the App. at 124a.

BASIS FOR JURISDICTION IN THIS COURT

On July 9, 1998, the Second Circuit denied petitioners' timely petition for rehearing. App. 1a. The judgment sought to be reviewed was entered on June 3, 1998. App. 4a. This Court has jurisdiction to review the decision under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners are customers of "adult businesses" and adult entertainment in New York City, who have challenged a New York City zoning ordinance, alleging that the zoning regime adopted by the City of New York with respect to adult establishments will substantially and unconstitutionally restrict petitioners' access to adult entertainment. Petitioners contend that the zoning ordinance violates their First Amendment rights and that the court below misapplied the standards set forth by this Court in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), and Young v. American Mini Theatres, 427 U.S. 50 (1976), which require, inter alia, that a municipality seeking to regulate adult book stores, theaters and places of entertainment must demonstrate that the enactment "allows for reasonable alternative avenues of communication." The Courts of Appeals for the Fifth and the Ninth Circuits properly apply this Court's standards by requiring municipalities seeking to restrict adult businesses to demonstrate that alternative locations are suitable for and accessible to adult businesses as a realistic and practical matter. In this case, the Second Circuit upheld New York City's enactment without any such showing.

Petitioners also contend that the lower federal courts erroneously denied their request for preliminary injunctive relief on the ground that petitioners' First Amendment claims would ultimately be barred by principles of collateral estoppel, in disregard of the standards articulated by this Court in Montana v. United States, 440 U.S. 147 (1979).

Factual Background

In 1995, the City of New York adopted a zoning regime with respect to adult entertainment establishments. App. 124a. The City conceded that only 28 existing adult businesses

would be permitted to remain at their current locations after the zoning enactment is implemented. (J.A. 989).[1] Accordingly, more than 84% of the 177 then-existing adult establishments would be required to move or to close or to otherwise change the nature of their businesses. (J.A. 989).

City officials asserted, however, that the new zoning enactment will leave more than 500 parcels of land available for the re-location of the approximately 150 businesses that were to be required to move. (J.A. 989).

Yet this estimate rested upon an abstract and theoretical methodology that did not involve the identification of any specific parcels of land that were supposedly available and that failed entirely to consider whether any specific parcels were actually suitable.[2] Indeed, the City conceded that it never conducted a parcel-by-parcel examination of any actual sites. Moreover, the City's claim that more than 500 sites would be available for the relocation of adult businesses was seriously refuted by declarations against interest made by defendant Rudolph Giuliani immediately after the New York Court of Appeals rendered its decision on petitioners' state constitutional claims in February 1998. Mayor Giuliani announced, at that time, that no more than 20 or 30 adult businesses would survive under the new zoning plan because

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[1] References preceded by "J.A." are citations to the Joint Appendix filed by petitioners and petitioners in Amsterdam Video et al. v. City of New York et al. in the Second Circuit.

[2] As is more fully discussed below, City officials arrived at this projection by placing a dot on the line of a zoning map demarcating the residential zones and then measuring a distance of 500 feet from that dot outside the residential zones and then continuing to identify dots on the map each 500 feet from the previous dots. This process was undertaken without considering -- or examining -- the realistic suitability of the projected alternative sites. (J.A. 852).

relocation sites for adult establishments have been "severely limited."

In late July, 1998, after this Court rejected an emergency stay application brought on by the Amsterdam Video petitioners, the City began to enforce the adult zoning ordinance. To date, nearly 50 adult businesses[3/] have closed and either gone out of business altogether or have substantially altered the nature of their businesses -- abandoning the business of adult entertainment completely or reducing the quantity of their adult entertainment business to less than 40% of the total volume of any such business.[4/] The City has indicated that it will continue to pursue aggressive enforcement activities to force additional closures or substantial changes in the nature of the businesses' operations.

Proceedings Below

Petitioners' request for injunctive relief in the federal courts followed a rejection, by the New York State Court of Appeals, of petitioners' state constitutional challenge to New York City's zoning enactment. App. 65a.

[3/] As was reported in the September 29, 1998 edition of *The Christian Science Monitor*, 21 businesses closed voluntarily in late July after the City began to enforce the zoning enactment. The City has pursued aggressive enforcement activity against another 29 businesses.

[4/] Pursuant to City-issued enforcement guidelines, to come into compliance with the zoning enactment, a business must reduce its stock of adult materials to less than 40% of their overall stock-in-trade. These enforcement guidelines are the subject of on-going litigations in the State Supreme Courts of the five counties that comprise New York City and in appeals filed in two of the New York State Appellate Divisions.

A. Removal and Remand

Petitioners' suit challenging the New York City zoning enactment on state as well as federal constitutional grounds was initially filed in Supreme Court, New York County.[5/] The City petitioned to remove the case to federal District Court (J.A. 167-168). In a decision rendered in June 1996, the District Court concluded that abstention under Railroad Commission v. Pullman Company, 312 U.S. 496 (1941) was appropriate and remanded the case to the state courts to adjudicate petitioners' state constitutional claims. App. 45a. The District Court retained jurisdiction of petitioners' federal constitutional claims but stayed all proceedings in the federal Court pending the disposition of petitioners' state constitutional challenge in the state courts. App. 64a. Upon remand of petitioners' state constitutional claims to the state court, petitioners filed a statement in the state court, pursuant to England v. Louisiana Board of Examiners, 375 U.S. 411 (1964), expressly reserving their right to return to federal court in order to litigate their federal constitutional claim in a federal forum and announcing their intent to present to the state court only those claims arising under Article I, § 8 of the New York State Constitution. (J.A. 312-315).

B. New York State Court Proceedings

In the State Supreme Court for New York County, the

[5/] Over 100 owners and operators of adult establishments simultaneously commenced a companion case in Supreme Court for the State of New York, County of New York bearing the caption "Amsterdam Video et al. v. City of New York et al. In both the state court proceedings and in the federal court proceedings, the Amsterdam Video case has been administratively consolidated with the Hickerson case.

case was assigned to Justice Marilyn G. Diamond (J.A. 826).[6] On July 23, 1996, shortly after the case was remanded from the District Court to the State Supreme Court, petitioners served discovery requests on defendants. (J.A. 826-27). Such discovery was directed at three critical issues in this case, including what specific parcels of land will remain available, under the zoning enactment, for the relocation of adult businesses.

On August 12, 1996, defendants responded to one of petitioners' interrogatories, answering that "Defendants have never identified or determined the locations of available adult establishment receptor sites in New York City under the Amended Zoning Resolution" (J.A. 407).[7] Because the City's interrogatory answers never identified any specific

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[6] Justice Diamond treated the case as one that was consolidated with Amsterdam Video and a third case, Stringfellow's Ltd. v. City of New York et al. 95a. Justice Diamond further permitted 47 additional parties, comprising the Times Square Business Improvement District and the Center for the Community Interest, then named the American Alliance for Rights and Responsibilities, and 45 other community groups, business organizations and local elected officials to intervene in all three cases (J.A. 826).

[7] This answer conformed with the statement by Albert Fredericks, Assistant Corporation Counsel, in a colloquy with Justice Diamond at a conference with the Court on August 6, 1996.

> The Court: How did you identify these 500?
>
> Mr. Fredericks: What we did is we took a map, and basically the people at City Planning, we took a map and looked at all the districts where this is allowed, and we'll give you maps, and then we simply started going along the map streets ... measuring every 500 feet ... this was an in-house calculation that was done. I'll ask City Planning if they have anything, but this was not -- we never produced or published a map that said here are the 514 sites.

parcels of land that would be available for the relocation of adult businesses and, perforce, never provided any evidence of the practical suitability or accessibility of any specific sites, petitioners sought further discovery on the issue of alternative locations. (J.A. 827). On August 16, 1996, however, Justice Diamond entered an order staying all discovery in the proceedings.

On August 22, 1996, Justice Diamond agreed to permit petitioners to conduct a single deposition of Marilyn Mammano, an official from the Department of City Planning ("DCP"). The scope of questioning at that deposition was limited, however, to the method by which the City estimated that 500 sites would be available for adult businesses under the zoning enactment. (J.A. 827). Ms. Mammano conceded, at that deposition, that the City's calculation of 500 available locations rested upon an entirely fanciful exercise that projected the abstract possibility of 500 sites at intervals of 500 feet but that never even identified the locations of any of these sites.[9/]

[9/] When questioned as to how the defendants calculated the number of adult businesses that could locate within the five boroughs of New York City, Ms. Mammano testified that personnel in the DCP, under her direct supervision, essentially engaged in a two-step process. First, DCP personnel entered various programming instructions into a computer program generating DCP maps for each borough, which presented, on a tax-lot basis, the districts where adult businesses would be permitted (J.A. 861, 865). Although a street grid appeared on each map, no identifying street names or neighborhood landmarks appeared on the maps and the maps were generated on a scale that made identification of exact site locations difficult, if not impossible (J.A. 864).

Second, DCP personnel took those maps and manually measured out with a compass/scale device, in the districts where adult businesses would be permitted, distances of 500 feet and placed imaginary "dots" at those

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Nevertheless, on the basis of this abstract calculation, the City moved for summary judgment and claimed that its zoning enactment provided ample alternative sites for the relocation of the nearly 150 businesses that would be required to move. It advanced this claim without identifying any specific parcels of land. And it advanced this claim despite the fact that it was clear -- from even the most obvious examination -- that much of the area that the City claimed was available, in fact, was unlikely ever to be rendered accessible to adult businesses.[2/]

[1/](...continued)
500 foot intervals. Each "dot" represented a potential location for an adult establishment. According to Ms. Mammano, the total number of "dots" came to more than 500. Ms. Mammano stated:

"Then what we did is took a 500-foot distance on a scale, and we actually laid out physically along the road system, and again only along the road system that we knew to be available. Not calculating additional roads and additional subdivisions which could have been accomplished. And we simply placed potentially at 500-foot intervals marks which indicated potential sites for adult establishments within the zones that they would be permitted, taking into account all of the locational buffer restrictions, sensitive receptors, et cetera. That is how it was produced ...[it] was not the purpose of the exercise, to be site specific. It was only to give an estimate of the total number, not the site specifics." (J.A. 852).

[2/] Parcels of land that, according to the City, were available in Manhattan for relocation by adult businesses included those currently occupied by the Jacob Javits Convention Center, the Gansevoort Meat Market, the U.S. Post Office Chelsea Distribution Facility, Manhattan's Flower District, the Chinese Consulate, portions of the Hilton Hotel, the Equitable Center, the Time Life Building, the NBC/Today Show studios, the Rockefeller Center Complex, Macy's and City Hall Park. Other sites are occupied by structures entirely unsuitable for retail operations, including Bronx Terminal Market, Hunts Point Sewage Treatment Plant, Brooklyn Navy Yard, Red Hook Container Port, Long Island Rail Road Jamaica Train Yards, Fresh Kills Landfill, Port Mobil and Arthur Kill Correctional Facility. Many of the remaining sites suggested by the City lack
(continued...)

Despite the highly speculative and unrealistic nature of the City's calculation, the State Supreme Court Justice concluded that defendants had met their burden of demonstrating ample alternative locations for adult businesses. This conclusion was critical to the disposition of the state constitutional claims. The State Supreme Court further concluded that the "predominant purpose" of City officials in enacting the zoning measure was not to restrict sexually explicit expression because of its offensiveness to many people and that the zoning law was adopted because of the "adverse secondary effects" of such businesses.[10/] And on the basis of these conclusions, Justice Diamond granted the City's motion for summary judgment and dismissed petitioners' state constitutional claims. The State Supreme Court decision

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[9/](...continued)
appropriate infrastructure, including public transportation and sidewalk and road access to make retain operations possible. Such areas include Staten Island's Island of Meadow and Shooter's Island Bird Sanctuaries, as well as the Clay Pit Ponds State Park Preserve in Staten Island and the Con Rail/Amtrak/Metro North rights of way along the Hudson River in upper Manhattan and the Bronx. (J.A. 837-42).

[10/] This conclusion was reached despite the fact that the trial court permitted no depositions and no significant factual inquiry into the purposes underlying the City's enactment; and despite the fact that the New York City Department of City Planning attempted to examine whether adult businesses caused "adverse secondary effects" and was forced to concede that its study "did not yield conclusive evidence of a direct relationship between the adult use and the urban ills affecting the community." (J.A. 843); and despite the fact that two other studies of "adverse secondary effects" with respect to New York City communities were similarly inconclusive. (J.A. 843). Nevertheless, Justice Diamond granted summary judgment to the City on these issues, without serious discovery and without any evidentiary hearing and even though material disputes of fact existed with respect to the "adverse secondary effects" issue just as they existed with respect to the City's claim of ample alternative locations.

issued on October 23, 1996. App. 95a.[11/] This decision was affirmed, in summary fashion, by the Appellate Division, First Department on July 17, 1997. 92a. And on February 24, 1998, the New York Court of Appeals affirmed the lower court decision. App. 65a.

In response to the New York Court of Appeals decision, Mayor Rudolph Giuliani provided new and additional grounds to suspect the accuracy of the City's claim that the zoning enactment provided reasonable alternative locations for adult businesses. On the day that the New York Court of Appeals decision was released, the Mayor announced that the "places

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[11/] On October 24, 1996, the Appellate Division, First Department stayed enforcement of the zoning enactment and granted an interim stay of the State Supreme Court's order and judgment pending appeal. On October 31, 1996, defendants entered into a stipulation with plaintiffs agreeing to extend the Appellate Division's interim order, staying enforcement of the zoning enactment, as well as the State Supreme Court's order and judgment, in accordance with the provisions of New York CPLR § 5519(e). The stay, therefore, remained in effect through the disposition of the state law claims by the new York Court of Appeals.

On return of the case to federal court, the District Court stayed enforcement of the Zoning Resolution (J.A. 1253). And, on appeal to the Second Circuit, a further stay was issued by that Court (J.A. 1264-65). The Second Circuit vacated that stay and ordered immediate issuance of the mandate in the Hickerson proceedings on June 3, 1998. App. 32a. The stay remained in effect and the issuance of the mandate was stayed pending the disposition of petitioners' petition for rehearing. When the petition was denied on July 9, 1998 (App. 1a), the stay was vacated and the mandate issued on July 16, 1998. A corrected mandate was issued on July 21, 1998. The Amsterdam Video petitioners unsuccessfully pursued emergency applications for stay of the mandate in their proceeding with both the Second Circuit and this Court. This Court rejected the Amsterdam Video petition on or about July 29, 1998. The City immediately began to enforce the zoning enactment, bringing numerous ex parte nuisance abatement proceedings against owners and operators of adult businesses in the five boroughs.

[adult businesses] can relocate are severely limited ... our eventual analysis of it is that [the Zoning Resolution] will reduce the number [of adult businesses] in the City to something like 20 or 30, whereas previously there had been over 200 ... what we did -- and I think it was very artful ... we pushed to the limit and left a small amount of space that is available. The end result will be dramatically fewer sex shops and porn shops in the City...." (J.A. 913-14).

C. Proceedings in the District Court

On February 27, 1998, petitioners returned to federal court to adjudicate their federal constitutional claims and sought a stay of the enforcement of the zoning enactment and preliminary injunctive relief maintaining the status quo pending further litigation in the case.

Judge Cedarbaum, U.S.D.J., granted the Hickerson and Amsterdam Video petitioners' application for a temporary restraining order pending a hearing on petitioners' motion for preliminary injunctive relief.[12/] Judge Cedarbaum further directed that the parties file any "new" evidence with her chambers no later than close of business on Wednesday, March 4, 1998 and, further, that the parties file supplemental papers no later than March 5, 1998 at noon.

The Hickerson petitioners filed with the District Court on March 4, 1998 a videotape of segments of Mayor Rudolph Giuliani's February 24, 1998 daily news conference carried on the New York City owned and operated cable television station, Crosswalks, at which he responded to questions with

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[12/] Judge Cedarbaum also granted the renewed application of TSBID for permission to intervene in these actions. Judge Cedarbaum subsequently also granted the renewed intervention application of CCI and some 45 other community groups, business organizations and local elected officials.

respect to the impact of the adult zoning ordinance on adult establishments in New York City (J.A. 913). Petitioners also provided a copy of the transcript to the Court on March 7, 1998 (J.A. 914). As noted above, at that press conference, defendant Giuliani announced that as a result of the City's artful manipulation of the permissible zoning locations, only 20-30 establishments will be left in New York City after the zoning enactment is enforced.

The Amsterdam Video petitioners filed with the Court on March 6, 1998, inter alia, the supplemental affidavit of R. Bruce McLaughlin, a nationally recognized land use expert retained by the Amsterdam Video petitioners (J.A. 1019-1231). In that affidavit, Mr. McLaughlin noted that there were 177 existing adult uses in the City, of which 147 would be required to close, move or alter the nature of their existing business operations to conform with the requirements of the zoning ordinance (J.A. 1032). He further indicated, in that affidavit, that it was his estimate that no more than 90 potential sites would exist in the five boroughs of New York City under the adult zoning enactment. (J.A. 1033).

After oral argument was conducted on March 6, 1998, Judge Cedarbaum denied petitioners' application for a preliminary injunction but stayed her order until the close of business on March 11 "so that petitioners can promptly seek from the Second Circuit a stay pending appeal." (J.A. 1253). The District Court's denial of preliminary injunctive relief in this case rested upon the conclusion that the questions adjudicated by the New York State courts with respect to the state Constitution derived from this Court's opinion in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986) and were either identical to, or encompassed, the questions of constitutionality under the federal Constitution, so that the New York State courts must be found to have implicitly upheld the constitutionality of the zoning amendment under

the federal Constitution. App. 40a. In essence, the District Court denied petitioners' request for a preliminary injunction upon its belief that petitioners' federal constitutional claims were foreclosed by principles of collateral estoppel.

D. Proceedings in the Circuit Court

On March 11, 1998, the Hickerson and Amsterdam Video petitioners sought an interim stay pending a hearing before a three-judge panel on their motion for a stay pending appeal and expedited appeal. Circuit Judge John J. Walker granted the interim stay and set the motion down for hearing on March 17, 1998 before a three-judge panel of the Second Circuit.

Argument on petitioners' motions was held on March 17, 1998 before Circuit Judges Dennis Jacobs, Pierre N. Laval and John R. Gibson, sitting by designation. Petitioners' motion for a stay pending appeal was granted, as was the motion for an expedited appeal.

At issue in petitioners' appeal was whether, in denying petitioners' request for preliminary injunctive relief, the District Court erroneously concluded that petitioners' federal constitutional claims are foreclosed by principles of collateral estoppel. In addressing this issue, petitioners argued to the panel that, under Montana v. United States, 440 U.S. 147, 155 (1979), collateral estoppel is not appropriate (1) where the factual issues decided in the first proceeding are not substantively the same as those that need to be decided to resolve the claims in the second proceeding; or (2) where controlling facts have changed significantly between the first proceeding and the second; or (3) where other "special circumstances" warrant an exception from the normal rules of preclusion; or (4) where the party against whom collateral estoppel is being applied did not have a full and fair opportunity to litigate the issues.

Petitioners further argued to the panel that each of the four exceptions to collateral estoppel identified by the Supreme Court in Montana is present here. First, under both the state and federal constitutions, a municipality that seeks to restrict significantly the location of adult bookstores and theaters bears the burden of demonstrating that its enactment leaves reasonable alternative locations of existing businesses. But, the federal and state constitutions differ with respect to the sufficiency of the evidentiary submission necessary to discharge that burden. In the state court proceedings, City officials allowed that their calculation of potential areas for relocation rested upon an abstract and theoretical methodology that did not involve the identification of any specific parcels of land. Accordingly, the City could not determine whether any of its projected sites provided realistic opportunities for the relocation of adult businesses within a genuine real estate market (J.A. 874). It was and remains petitioners' position that the standards set forth by this Court in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), and Young v. American Mini Theatres, 427 U.S. 50 (1976), and refined by the lower federal courts -- particularly those of the Fifth and Ninth Circuits[13/] -- require a more rigorous examination of alternative locations than that offered by the City and employed by the state courts in upholding the City's enactment under the state constitution; and that, therefore, the fact-finding of the state courts on this issue was insufficient to satisfy federal constitutional standards.

Petitioners also asserted that new factual representations by the City had emerged between the conclusion of the state court proceedings and the subsequent proceedings before the District

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[13/] See, e.g., Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993), cert. denied 511 U.S. 1030 (1994); Woodall v. City of El Paso, 49 F.3d 1120, 1127 (5th Cir. 1995)("Woodall III"), infra at 20 et seq.

Court rendering collateral estoppel inappropriate. The new facts took the form of a statement by Mayor Rudolph Giuliani that the "number of adult establishments in the City would be reduced to no more than 20 or 30, whereas previously there had been over 200 [such businesses]." (J.A. 913-14). This projection, which was dramatically at odds with the 500 site projection offered by the City during the state court proceedings, raised serious questions about the City's claim of ample alternative locations for the nearly 150 businesses that will need to relocate under the zoning enactment.

Petitioners also argued, to the panel, that this case presents "special circumstances" that warrant an exception from the normal rules of preclusion. Such "special circumstances" arise out of the atypical posture of this case involving abstention under Railroad Commission v. Pullman Company, 312 U.S. 496 (1941); a remand of the state law issue to the state courts; the retention of the federal constitutional question for subsequent resolution; and the reinforcement of this procedural arrangement by petitioners' filing, pursuant to England v. Louisiana Board of Examiners, 375 U.S. 411 (1964), of an express reservation of the federal claims for resolution in the federal forum.[14/]

Finally, petitioners asserted that because of the severely

[14/] Petitioners further asserted that a second "special circumstance" was presented in this case by virtue of the unique doctrine created by this Court in Bose Corp. v. Consumers' Union, 466 U.S. 485 (1984) for First Amendment cases. Petitioners contended that, if petitioners were foreclosed from presenting new evidence in the federal court in support of their federal constitutional claim and if the factual record were imported from the state courts and given preclusive effect by the federal District Court, under Bose, that record must be subjected to de novo review by the federal Court of Appeals in order to make sure that the judgment does not constitute a "forbidden intrusion on the field of free expression."

constricted discovery and summary adjudication in the State Supreme Court, the state court proceedings did not provide a full and fair opportunity to litigate such questions as whether the City's enactment provided reasonable alternative locations for adult businesses.

In a decision, rendered on June 3, 1998, the United States Court of Appeals for the Second Circuit rejected each of these arguments and unanimously affirmed the District Court's decision. App. 4a. Petitioners filed a petition for rehearing and suggestion for rehearing en banc on June 17, 1998. On July 9, 1998, the Second Circuit denied petitioners' timely petition for rehearing. App. 1a.

REASONS FOR GRANTING THE PETITION

The Court of Appeals first reasoned that the City's burden of demonstrating ample alternative locations is no greater under the First Amendment than that imposed by the New York State courts in applying state constitutional doctrine. In this regard, the Second Circuit concluded "we are aware of no federal case and petitioners have directed our attention to none that requires municipalities to identify the exact locations to which adult establishments may relocate, as opposed to identifying the general areas ...." App. 18a-19a. This determination conflicts with the decisions of the Fifth and Ninth Circuit Courts of Appeals on the same matter. Federal court decisions in the Fifth and Ninth Circuits impose a clear obligation on municipalities to demonstrate a sufficient number of parcels that are physically and legally available for the relocation of adult businesses. Such a demonstration cannot realistically be accomplished without the examination of the characteristics of specific sites.

In rejecting petitioners' claim that new facts have come to light warranting a re-examination of the question of whether

the City has provided ample alternative locations for adult businesses, the Second Circuit concluded that the new facts -- in the form of Mayor Giuliani's projection of no more than thirty remaining adult businesses -- are not sufficiently significant, for purposes of the Montana collateral estoppel analysis, "when compared to the extensive legislative record," App. 30a, that conflicts with the Mayor's projections vis-a-vis alternative locations. It follows, however, that if the City's state court submission on this issue was inadequate to satisfy First Amendment standards, the record adduced in the state courts on this issue cannot be found to outweigh, in significance, the recent statement by Mayor Giuliani that the municipal enactment would leave between twenty and thirty adult businesses in the City.

In England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 422 n. 13 (1964), this Court indicated that "[o]nce issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question." Yet, the Second Circuit concluded that the principles set forth in England apply only to litigants who have invoked the jurisdiction of the federal court in the first instance; and that such principles do not bar the application of collateral estoppel in this case because petitioners initially filed their suit in state court and, therefore, the invocation of collateral estoppel does not deprive petitioners of their chosen federal forum. App. 24a-26a. But, in this regard, the Second Circuit focused only upon petitioners' initial decision to initiate their lawsuit in state court, rather than upon the choice made by the petitioners after the District Court's abstention decision in this case.[15/]

[15/] The Second Circuit also erroneously determined that the Bose doctrine is inapplicable.

Finally, on the issue of whether petitioners were denied a full and fair opportunity to litigate their claims in state court, the Second Circuit adopted the District Court's finding that the state court finding rested upon an extensive record. App. 23a. But, again, the proceedings in the state court were directed at a diminished and deferential state constitutional standard. Consequently, such evidence cannot be regarded as adequate to resolve petitioners' federal constitutional claim regardless of the size of the state court record on this issue. Moreover, the proceedings in the state court were quite abbreviated and suffered from limited discovery and no evidentiary hearings on the critical factual dispute with respect to whether the City had met its burden of ensuring that the zoning enactment provides a sufficient number of parcels that are physically and legally available for the relocation of adult businesses.

I. The Standards Applied by the Second Circuit for Determining Whether a Zoning Enactment "Allows for Reasonable Alternative Avenues of Communications" Are At Odds with the Standards Imposed by the Ninth and Fifth Circuits

Under First Amendment doctrine set forth by this Court in City of Renton v. Playtime Theatres, 475 U.S. 41 (1986), and Young v. American Mini Theatres, 427 U.S. 50 (1976), a municipality seeking to regulate adult book stores, theaters and places of entertainment must demonstrate, inter alia, that the enactment "allows for reasonable alternative avenues of communication." Renton, 475 U.S. at 50. But, the issue of "reasonable alternatives" for the location of adult businesses invites the further question of what characteristics render a

parcel of land suitable or accessible for these purposes.[16/]

This question was addressed only fleetingly in Renton. And this is not entirely surprising, since Renton did not involve the problem of finding re-location sites for "adult" businesses that were forced to move as a result of the ordinance at issue in that case. For, in Renton, no adult businesses were present in the community at the time that the municipality enacted its zoning legislation. Renton, 475 U.S. at 44. But, in Renton, this Court indicated that a municipality must "refrain from effectively denying [adult businesses] a reasonable opportunity to open and operate [...] within the city." Id.

Accordingly, the task of refining the concept of the suitability of alternative locations has been left largely to the lower federal courts. In discharging this task, the federal courts have generally required municipalities to demonstrate that alternative locations are suitable for and accessible to

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[16/] Under the First Amendment, the general standard of "reasonable alternative" locations embraces two subsidiary questions. As is more fully discussed in the text, infra, the first question involves the genuine accessibility and realistic suitability of such alterative sites.

The second question is whether the zoning enactment under review will reduce the number of adult businesses below a constitutionally acceptable threshold. In this regard, the lower federal courts have looked to this Court's decisions in Young v. American Mini Theatres, 427 U.S. 50 (1976), and Schad v. Borough of Mt. Ephraim, 452 U.S. 62, 71 (1981), and concluded that, under the First Amendment, it is constitutionally impermissible for a zoning enactment to, in fact, reduce the total number of such businesses. See Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102, 1108-09 (9th Cir. 1988); Christy v. Ann Arbor, 84 F.2d 489 (6th Cir. 1987). This question acquires special importance in a case, such as this, where a zoning enactment will require a great many adult businesses to close or to relocate.

adult businesses as a realistic and practical matter. Therefore, petitioners argued to the Second Circuit that -- in order to sustain its burden under the First Amendment -- the City must demonstrate that there are a sufficient number of specific sites that are physically and legally available and part of the actual business real estate market to satisfy, at the least, the nearly 150 adult businesses that will be forced to relocate. The Second Circuit found, however, that the argument that the City must "identify the precise sites to which adult establishments could relocate" is "unsupported by any federal case law." App. 18a-19a. This conclusion is incorrect.

In Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524 (9th Cir. 1993), cert. denied 511 U.S. 1030 (1994), the Ninth Circuit indicated that there were two overarching questions that a court must answer when determining whether an adult establishment has been afforded a reasonable opportunity to relocate.[17/] The court must first consider "whether relocation sites provided to businesses may be considered part of an actual business real estate market." Id. at 1530 (emphasis supplied). According to the Ninth Circuit, the Court must then consider whether "after excluding those sites that may not properly be considered to be part of the relevant real estate market, there are an adequate number of potential relocation sites for already existing businesses." Id.

The Ninth Circuit further identified five specific questions with respect to each proposed relocation site -- (i) is the site ever likely to become available to any commercial enterprise; (ii) is the site reasonably accessible to the general public; (iii) does the site have a proper infra-structure such as sidewalks,

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[17/] The Ninth Circuit noted that "although Renton stresses that the First Amendment only requires a relocation site to be potentially available rather than actually available, the requirement of potentiality connotes genuine possibility." Topanga, 989 F.2d at 1531.

roads and lighting; (iv) does the site suit some generic commercial enterprise or is it a warehouse, swamp or sewage treatment plant; and (v) is the site commercially zoned. The five-part Topanga inquiry logically assumes that relocation sites be specifically identified. These questions cannot be answered in the abstract.

Indeed, the Ninth Circuit indicated that both the Topanga plaintiffs and the City of Los Angeles introduced substantially similar yet detailed analyses of specific relocation sites that fell within the reach of the zoning ordinance under consideration in Topanga. See Topanga, 989 F.2d at 1531-1533. The Topanga court accepted the findings of the Topanga plaintiffs' geographical expert and real estate expert who

> conducted an extensive survey of the City to determine which geographical areas within the City would be permissible as potential sites for establishing or relocating these adult businesses [finding] that there are 11613.1 acres of what the parties call "definitionally available" relocation sites where the City would allow an adult business to exist. Out of these 11613.1 acres, however, [the experts] concluded that much of the land was not truly available ... [including, among other things, thousands of potentially available acres submerged beneath the Pacific Ocean or the outer harbor of the Port of Los Angeles, or occupied by landing strips for the Los Angeles Airport, landfill, the Van Nuys airport, Port of Los Angeles and oil refineries, petroleum gas storage fields, large industrial plants, Children's Hospital, junk yards, steel yards, car storage lots].

Id. at 1531-32.

The Ninth Circuit is not alone in fashioning standards to

determine whether a municipality restricting adult businesses has, in actual and realistic terms, allowed ample alternative locations. Other federal decisions have also insisted upon a realistic and factual demonstration. In Woodall v. City of El Paso, 49 F.3d 1120, 1127 (5th Cir. 1995)("Woodall III"), the Fifth Circuit indicated that "in determining whether there are sufficient sites available, the finder of fact may exclude land under the sea, airstrips of international airports, sports stadiums, areas not readily accessible to the public, areas developed in a manner unsuitable for any generic commercial business, areas lacking a proper infrastructure, and so on." In Woodall -- as in Topanga -- the municipality offered a specific identification of available sites. "The City identified 50 specific sites meeting the Ordinances' spacing requirements which it contended were physically and legally available [...] In addition to the 50 sites identified as available in 1988, the City identified 16 additional sites that had become available due to rezoning." Woodall, 49 F.3d at 1125. See also Woodall v. The City of El Paso, 950 F.2d 255, 260-1 (5th Cir. 1992)("Woodall I"), modified on reh'g, 959 F.2d 1305 (5th Cir. 1992)("Woodall II")(same).

In a number of other federal court decisions, sites were specifically identified and analyzed under the reasoning set forth in Topanga and Woodall. For example, in Grand Brittain, Inc. v. City of Amarillo, 27 F.3d 1068, 1069 (5th Cir. 1994), the District Court was able to identify 63 specific sites and that court, as well as the Fifth Circuit, was provided with substantial testimony as to the specific sites in order to determine whether sites had electricity and gas available, water and sewer extensions, street access or current use by a government entity. In Walnut Properties, Inc. v. City of Whittier, 861 F.2d 1102, 1108 (9th Cir. 1988), cert. denied, 490 U.S. 1006 (1989), the Ninth Circuit invalidated a zoning ordinance because separational requirements eliminated most of the allegedly available acreage from the analysis, but

specifically noted that it also had insufficient information about the specific nature of the sites to determine whether the zoning ordinance at issue in that case violated Renton. In Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255 (5th Cir. 1992), the court noted that there were "four areas with eight to ten locations" available and suitable as alternative sites for the six establishments in the city and that "nothing in the instant record indicate[d] that all or even most of the locations are inaccessible, unsafe, or without utilities or infrastructure or that legal obstacles exist to their use." Lakeland Lounge, 973 F.2d at 1260. See also Basiardanes v. City of Galveston, 682 F.2d 1203 (5th Cir. 1982)(specific site by site analysis conducted by the court which revealed that the industrial zones were largely a patchwork of swamps, warehouses and railroad tracks, lacking access roads and retail establishments, locations that were "poorly lit, barren of structures suitable for showing films and perhaps unsafe"); Purple Onion, Inc. v. Jackson, 511 F. Supp. 1207, 1214-15, 1223-25 (N.D. Ga 1981)(same, containing a comprehensive analysis of unavailability of specific sites, including easements, location in flood plains, inaccessible to automobile traffic, location in or near noxious uses including petroleum fuel tank fields and sewage treatment plants, employee parking lots for large permanent manufacturing facilities, land owned by the City of Atlanta and railroad rights of way).[18/]

[18/] In D.H.L. Associates, Inc. v. O'Gorman, 6 F. Supp.2d 70 (D. Mass. 1988), the Court applied the Topanga test in considering whether five specific parcels were "available." In Centerfold Club, Inc. v. City of St. Petersburg, 969 F. Supp. 1288 (M.D. Fla. 1997), the court accepted both the Topanga and the Woodall tests in its analysis of whether twenty specific sites considered "available" by the City were, in fact, available. The district court ultimately concluded that nineteen sites were available, but that that number was constitutionally inadequate. In Centennial Video, Ltd. v. City of Rock Island, 1992 U.S. Dist. LEXIS 4882 (C.D. Ill. 1992), the court accepted the Woodall test but denied both parties' motions for

(continued...)

In this case, New York City offered and the state courts accepted a highly abstract calculation of alternative locations. The City officials simply claimed that it was theoretically possible to fit 500 adult businesses within a general area set aside for such businesses, if one did not consider whether any of the theoretical locations were realistically available as part of a viable real estate market; and that, it was not possible to know whether any locations were genuinely available because City officials had not identified actual sites.

Such a showing by the City cannot be found sufficient under the First Amendment. The Second Circuit's acceptance of the approach adopted by the New York Courts in this case has diminished First Amendment standards well below any level of serious judicial scrutiny and has placed the Second Circuit dramatically at odds with the interpretation of First Amendment doctrine provided by the other circuits discussed above. This Court should grant certiorari to resolve that direct conflict and to make it clear that the First Amendment requires more serious judicial scrutiny than was applied by the Second Circuit.

II. The Courts Below Disregarded this Court's Teaching in *Montana v. United States*, 440 U.S. 147 (1979), When They Invoked Principles of Collateral Estoppel to Deny Petitioners' Request for Preliminary Injunctive Relief.

In Montana v. United States, 440 U.S. 147, 155 (1979), this Court indicated that collateral estoppel is not appropriate (1) where the factual issues decided in the first proceeding are not substantively the same as those that need to be decided to

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[18]/(...continued)
summary judgment on the grounds that it had "insufficient information regarding the nature of the 102 acres at issue" to apply the Woodall test.

resolve the claims in the second proceeding or (2) where controlling facts have changed significantly between the first proceeding and the second; or (3) where other "special circumstances" warrant an exception from the normal rules of preclusion; or (4) where the party against whom collateral estoppel is being applied did not have a full and fair opportunity to litigate the issues. Each of the four exceptions to collateral estoppel identified in Montana is present here.

A. The Recent Statement of Mayor Giuliani Raises New Factual Issues that Are Significant and Sufficiently Serious To Raise a Fair Ground for Litigation

It follows that if the City's evidentiary submission in the state courts was insufficient to satisfy First Amendment standards on the issue of reasonable alternative locations, the record adduced in the state courts on this issue cannot be found sufficient to outweigh, in significance, the recent suggestion by Mayor Giuliani that the City's enactment would leave between twenty and thirty adult businesses in the City. (J.A. 913-14). At the very least, Mayor Giuliani's statement creates "sufficiently serious questions going to the merits" to create a "fair ground for litigation."[19/]

[19/] As this Court established in Young, 427 U.S. at 71 n. 35, 78-79, zoning laws that significantly reduce the number of adult theaters, bookstores and other places of entertainment below the quantity that existed prior to the enactment cannot be found to satisfy the First Amendment requirement that the City provide "reasonable" alternative locations for such businesses.

B. The Second Circuit Mistakenly Concluded that an England Reservation May Only be Made by a Party that has Invoked the Jurisdiction of the Federal Court in the First Instance

In England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 422 n. 13 (1964), this Court indicated that "[o]nce issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court determination of the federal question." Yet, the Second Circuit concluded that the principles set forth in England apply only to litigants who have invoked the jurisdiction of the federal court in the first instance and that petitioners cannot "meaningfully be said to have been deprived of a federal forum for their federal claims," since they initiated their lawsuit in state court. App. 24a-26a.

The Second Circuit's reasoning overlooks the fact that regardless of the initial litigation choice made by petitioners, the legally significant choice made by the petitioners, for purposes of the England analysis, occurred after the District Court issued its June 1996 abstention order. At that point, petitioners had the choice of presenting federal and state constitutional claims to the state courts or filing an England reservation re-enforcing the retention of federal jurisdiction over the federal constitutional claims by the federal District Court. They chose to file an England reservation in the state Supreme Court. And they adhered to the commitment made in their England reservation by presenting no federal constitutional claims in the state court proceedings. Under these circumstances, they should not have been denied their right to the adjudication of the factual as well as legal components of their federal constitutional claims by the federal courts, free from the preclusive reach of the collateral estoppel doctrine.

C. Petitioners Were Not Afforded a Full and Fair Opportunity to Litigate the Issue of Reasonable Alternative Avenues of Communication

The City's failure to demonstrate specific sites for the relocation of adult businesses is unsurprising in light of the abbreviated proceedings that took place in the state trial court -- proceedings that included virtually no discovery and no evidentiary hearing at which the City's claim of ample alternative locations could be measured against the rigors of cross-examination and evidentiary objections. (J.A. 826-27, 845-47).

This action was commenced in state court in February 1996. One month later, the City served a Notice of Petition for removal of the litigation from New York State Supreme Court to the federal District Court. Petitioners then sought to have the matters remanded to New York State Supreme Court. The matters were remanded to State Supreme Court by the District Court on June 27, 1998. Petitioners then served discovery requests on defendants which defendants largely refused to answer. Such discovery requests were directed, inter alia, at the numbers, locations and types of available relocation sites. As is set forth more fully in the record (J.A. 827), the State Supreme Court not only repeatedly denied petitioners' request that defendants be compelled to comply with such outstanding discovery requests, but entered an order, prior to any motions for summary judgment having been made, prohibiting any party from engaging in discovery without a court order.

The City, and the intervenors-defendants, then each moved for summary judgment, whereupon the State Supreme Court refused to entertain petitioners' request for further discovery -- except that the State Supreme Court grudgingly ordered one limited deposition to be taken of a witness who purported to

be familiar with the City's calculation of alternative locations. Defendants fiercely opposed even this limited discovery and the details as to what transpired at that deposition -- which included at least 30 directions to the witness not to answer questions that were propounded and repeated denials of requests for the production of documents that were critical to the City's hypothetical calculation that 500 sites exist for the 147 adult establishments that would be required to relocate -- are set forth more fully in the record. (J.A. 8450-47).

On October 23, 1996, the State Supreme Court granted the City's and intervenors-defendants' motions for summary judgment, upholding the constitutionality of the adult zoning enactment and dismissing petitioners' state constitutional claims. The State Supreme Court rested its decision on the papers submitted and oral argument held on September 18, 1996. The State Supreme Court held no evidentiary hearing, refused to take any witness testimony, and permitted no cross-examination of the witnesses whose affidavits had been proffered by the City. Under such circumstances, the conclusion that petitioners were not afforded a full and fair opportunity to litigate the issue of reasonable alternative avenues of communication appears inescapable.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant certiorari review.

Respectfully submitted,

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